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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-777

IN THE MATTER OF

ROBERT E. CLEVELAND and FRANCES H. CLEVELAND, ON BEHALF OF THEMSELVES AND ALL OTHER TELEPHONE SUBSCRIBERS AND CUSTOMERS OF ILLINOIS BELL TELEPHONE CORPORATION SIMILARLY SITUATED,

Petitioners,

VS.

ILLINOIS BELL TELEPHONE COMPANY, an Illinois Corporation, and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

IRVING GOODMAN
33 N. La Salle Street
Chicago, Illinois 60602
Attorney for Petitioners

MIDWEST LAW PRINTING CO., CHICAGO 60601, FINANCIAL 6-3988

INDEX

	PAGE
Petition for Writ of Certiorari	1
Opinions	2
Jurisdictional Statement	2
Questions Presented for Review	3
Statement of the Case	4
Reasons Why The Writ Of Certiorari Should Be Allowed	7
Conclusion	8
Appendix Attached to Petition for Writ of Certiorari:	
1. Opinion of U. S. District Court	1a-15a
2. Opinion of U. S. District Court (319 F. Supp. 418)	15a-20a
3. Opinion of U. S. District Court (325 F. Supp. 487)	20a-23a
4. Opinion of U. S. District Court Denying Motion to Remand Cause to State Court	24a-27a
5. Opinion of U. S. District Court Dismissing Suit	27a-29a

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Robert E. Cleveland and Frances H. Cleveland, on behalf of themselves and all other telephone subscribers and customers of Illinois Bell Telephone Corporation similarly situated respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Seventh Circuit, in the above cause.

(a)

OPINIONS.

The opinion of the United States Court of Appeals, Seventh Circuit is not reported in the Advance Sheets to date.

Two opinions of the United States District Court are reported in 319 F. Supp. 418 (October 16, 1970) and 325 F. Supp. 487, (December 11, 1970).

Two opinions of the United States District Court, the first denying the motion to remand the case to the State Court, and the second, dismissing petitioners' suit.

All of the foregoing opinions are set out in the Appendix at the end of this Petition for Certiorari.

(b)

JURISDICTION.

The jurisdiction of this court is invoked pursuant to Rule 23 on the following grounds:

(i) The judgment and opinion of the United States Court of Appeals was handed down September 22, 1971.

(ii) Not applicable.

(iii) Section 4254, Title 26, Internal Revenue Code, USCA, is being violated and nullified by respondent, Illinois Bell Telephone Company (hereinafter referred to as "Bell"), who is overcharging all telephone subscribers in

the Chicago area by charging "a tax on a tax." Namely, in calculating the 10% Federal excise tax on telephone calls, respondent charges 10% on both State of Illinois and City of Chicago taxes levied against telephone calls. It is this overcharge of a "tax on a tax" that petitioners contend is illegal, unlawful, and is merely an unwarranted and arbitrary overcharge by Bell. Petitioners contend that this is a controversy between Bell and the petitioners and all other customers in the Chicago area similarly situated. Further, petitioners contend that a representative or class action is proper and necessary in this cause to prevent a multiplicity of suits.

(c)
QUESTIONS PRESENTED FOR REVIEW.

(1) Did the United States District Court and Court of Appeals err in refusing to remand this cause to the State Court where the original suit was filed?

(2) Since the controversy was solely between Bell and its subscribers, was the United States a necessary party?

(3) Is this suit filed on behalf of all subscribers of Bell a representative suit or class action suit, or must each subscriber file a separate claim for refund from Bell?

(4) Is the overcharge by Bell of charging 10% on the State and City taxes on phone calls "a tax on tax" or is it a "service charge" as Bell contends?

These are the issues before this Court.

(d)

The only statute involved insofar as a statute forms the basis for Bell's overcharges of "a tax on a tax" is Section 4254, Title 26, USCA.

(e)

STATEMENT OF THE CASE.

This is a very simple case despite the complex decision of the United States Court of Appeals.

The petitioners filed a representative suit on behalf of themselves and all other subscribers and customers of Bell against Bell for Declaratory Judgment in the State Court of Cook County, Illinois, for a refund of overcharges by Bell.

The basic allegations in the Complaint are that Bell, without authority of law, was overcharging their subscribers and customers for a period of at least five (5) years prior thereto by collecting "a tax on a tax." The Complaint alleges that Bell was charging a 10% tax on the City and State taxes levied on all telephone bills.

Bell filed a petition in the State Court to remove the case from the United States District Court on the ground that federal taxes were involved. The case was duly removed to the United States District Court. Petitioners then filed their motion to remand the cause to the State Court on the ground that the Complaint was for wrongful overcharge and there was no question of a refund from the United States of America involved and that federal taxes were not involved. The motion to remand stated that the suit was "for wrongful overcharge by the defendant and it has nothing to do with a refund of taxes from the United States. The United States of America is not a party to this suit. The United States of America has no interest in said suit. No relief is sought against the United States of America. The only relief sought is against Bell, an Illinois Corporation, for wrongful charges made by it. The District Court denied the motion to

remand in a Memorandum Opinion, a copy of which is attached to this Petition.

Thereafter, petitioner, pursuant to leave of court, filed an Amended and Supplemental Complaint, seeking the same relief prayed for in the original Complaint, and adding United States of America as a party defendant.

Bell filed its Answer stating that federal taxes were involved; that no claim for refund had been filed; that such a filing for a refund with Internal Revenue Service was a prerequisite to maintaining any suit for refund and that the suit should be dismissed.

United States of America filed a motion to dismiss the Amended and Supplemental Complaint on the ground that the court lacked jurisdiction of the subject matter.

Petitioners filed a motion to deny the motion of the United States of America to dismiss the Amended and Supplemental Complaint.

A suit had also been filed in the United States District Court entitled, "Agron vs. Illinois Bell Telephone" seeking somewhat the same relief sought by petitioners but on a different theory.

The United States District Court in two Memorandum Opinions in the *Agron* case hereinbefore referred to found that the overcharge made by Bell was a "tax upon a tax", was improper, illegal and contrary to the statute but that each individual taxpayer had to file a separate claim for refund with Internal Revenue Service. These Memorandum Opinions are attached to his petition in the Appendix.

After arguments of counsel and the filing of a brief, the United States District Court entered its order on

December 18, 1970 dismissing Petitioners' Amended and Supplemental Complaint.

Petitioners appealed to the United States Court of Appeals and this case and the *Agron* case were consolidated for oral argument by said court.

Thereafter, on September 22, 1971, the United States Court of Appeals handed its opinion in the consolidated action affirming the decision of the District Court and further finding that the petitioners had no cause of action and entitled to no relief. Since there is only one opinion for this case and for the *Agron* case, this opinion is set forth in full in the Appendix attached to this petition for a writ of certiorari.

This petition for a writ of certiorari should be granted because it reveals that both the District Court and the United States Court of Appeals have erroneously held that petitioners' suit is a suit for a refund of taxes from the United States of America, when in truth and in fact, it is merely a suit for a refund from Bell for overcharges wrongfully made.

(f)

Not applicable to Judgment of Federal Court.

(g)

This court has jurisdiction where a suit filed in a State Court is erroneously transferred to the United States District Court and where the lower court has refused to remand the case to the State Court. Further, even if there is a question of federal taxes involved, the United States Court of Appeals committed plain error in holding that a claim for a refund must be filed with the Internal Revenue Service and in holding that this suit is not a representative suit or class action, but that each telephone subscriber must file a separate claim for refund.

(h)

REASONS WHY THE WRIT FOR CERTIORARI SHOULD BE ALLOWED.

1. The United States Court of Appeals in the above cause has misapprehended the issue by declaring that federal taxes are involved. This suit is a controversy between petitioners and those subscribers similarly situated and Bell. Petitioners have no quarrel with ~~United~~ States of America. United States of America submit no bills. United States of America collects nothing from petitioners. United States of America is not overcharging anyone. The Federal Statute, Title 26, Section 4254, does not sanction any overcharge. No relief has ever been sought from United States of America in petitioners' suit. All of petitioners' dealings are with Bell. Petitioners paid this overcharge to Bell. No one knows what Bell does with this money. Nowhere in any Federal statute are "charges for services" equated with State or local taxes. Bell merely has arbitrarily overcharged petitioners by adding on to the bill a 10% tax on State and City taxes.

2. "A tax on a tax" is illegal. The federal 10% tax on all local and long distance telephone calls imposed on the city and state taxes on such calls is clearly a tax on a tax and is contrary to the Federal Statute and contrary to common sense. (Title 26, Section 4254, USCA)

3. The United States District Court erred in refusing to remand the case to the State Court for disposition because all that is involved is the propriety of an overcharge by Bell.

4. Both the United States District Court and the United States Court of Appeals erred in holding that this suit was not a class action. To make each telephone subscriber file a separate claim for refund on the relatively small amounts involved is absurd, unfair, and so costly as to deprive the individual subscriber, as a practical matter, of his right to relief. (Title 28, Rule 23, Rules of Civil Procedure, USCA.)

5. The decision of the U. S. Court of Appeals, the decision of the U. S. District Court in the *Agron* case, and the decision of the U. S. District Court refusing to remand the petitioners suit to the State Court and then dismissing petitioners suit are plainly erroneous on their force because all of these decisions simply ignore the fact that the Federal tax imposed upon the State and City taxes upon phone calls is not authorized by statute and is merely an overcharge by Bell.

CONCLUSION.

For the reasons hereinabove assigned, it is respectfully urged that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

IRVING GOODMAN

Attorney for Petitioners

APPENDIX.

1.

Opinion of United States Court of Appeals entered September 22, 1971 (not yet reported in Advance Sheets):

IN THE
UNITED STATES DISTRICT COURT
For the Seventh Circuit

SEPTEMBER TERM, 1970 — APRIL SESSION, 1971

No. 71-1022
ROBERT C. AGRON, on behalf of himself and all other telephone subscribers of Illinois Bell Telephone Company who are situated similarly to him,
Plaintiff-Appellant,
v.
ILLINOIS BELL TELEPHONE COMPANY and UNITED STATES OF AMERICA,
Defendants-Appellees.

No. 71-1023
ROBERT C. AGRON, etc.,
Plaintiff-Appellee,
v.
UNITED STATES OF AMERICA,
Defendant-Appellant.

No. 71-1138
ROBERT E. CLEVELAND and FRANCES H. CLEVELAND, on behalf of themselves and all other telephone subscribers and customers of Illinois Bell Telephone Corporation similarly situated,
Plaintiffs-Appellants,
v.
ILLINOIS BELL TELEPHONE COMPANY, an Illinois Corporation, and UNITED STATES OF AMERICA,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

September 22, 1971

Before SWYGERT, *Chief Judge*, DUFFY, *Senior Circuit Judge*, and FAIRCHILD, *Circuit Judge*.

SWYGERT, *Chief Judge*. The substantive issue in these three appeals[1] is whether certain occupation taxes imposed on Illinois Bell Telephone Company (IBT) by the State of Illinois and various Illinois municipalities are properly includable in the base on which is computed the federal excise tax on "amounts paid for . . . communication services" under section 4251 of the Internal Revenue Code of 1954. Our resolution of this issue disposes of all three appeals.

Since there was no dispute as to any material fact, the Agron case was determined on cross-motions for summary judgment. Indeed, the case turns wholly on the interpretation and application of various state and federal statutes. The plaintiff, Robert C. Agron, a Chicago resident, is furnished telephone service by IBT. As a telephone subscriber, he is subject to the federal communications tax imposed by section 4251. IBT is required by section 4291 of the Code to collect the federal taxes which are imposed upon its customers, and under section 7501(a) it must hold them in "a special fund in trust for the United States." The amounts collected are paid over to the Internal Revenue Service each month. Treas. Reg. § 49.6302(c)-1. Agron contends that IBT, by including in the federal tax base those amounts identified on his telephone bills as attributable to state and local taxes, has improperly computed the federal tax which it collects from its subscribers and pays over to the United States.[2]

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[1] Pursuant to stipuation, Nos. 71-1022 and 71-1023 were ordered consolidated. By order No. 71-1133 was argued together with Nos. 71-1022 and 71-1023. For convenience, we will defer discussion of No. 71-1138 to the end of this opinion.

[2] Agron's position may be illustrated by reference to a typical telephone bill sent to him by IBT. His January 19, 1967 bill listed the following charges:

	Due to taxes*	U.S. Tax	Total
Telephone service — $17.50	.59	1.81	$19.90

* City and State Taxes.

As can be seen, IBT added the amount attributed to "City and State Taxes" to the basic charge for telephone service and arrived at a base for the federal tax of $18.09. Agron contends that his federal tax should have been $1.75 (10% of $17.50) rather than $1.81 (10% of $18.09).

For years the State of Illinois has imposed a "Messages Tax" on "persons engaged in the business of transmitting messages" which is measured by the "gross receipts from such business." Ill. Rev. Stat. ch. 120, §§ 467.1, 467.2 (1969). This tax was generally imposed at the rate of three percent until 1965 when the rate was increased to four percent. In 1967 the rate was further increased to five percent. In addition to the state tax, IBT is subject to certain local messages taxes. In 1955 Illinois authorized municipalities to tax "Persons engaged in the business of transmitting messages by means of electricity, at a rate not to exceed 5% of the gross receipts from such business originating within the corporate limits of the municipality." Ill. Rev. Stat. ch. 24, § 8-11-2 (1969). Many Illinois municipalities, including the City of Chicago, have exercised this authority to tax IBT.

At the same session at which municipalities were authorized to tax IBT, the Illinois legislature added subsection (a) to Ill. Rev. Stat. ch. 111 2/3, § 36 (1969). That addition provided that whenever a municipality exercised the authority to impose an occupation tax on a utility:

> such utility may charge its customers, in addition to any rate authorized by this Act, an additional charge equal to the sum of (1) an amount equal to such municipal tax, or any part thereof, (2) 3% of such tax, or any part thereof, as the case may be, to cover costs of accounting, and (3) an amount equal to the increases in taxes and other payments to governmental bodies resulting from the amount of such additional charge.

IBT imposes this additional charge by filing a supplemental schedule applicable to the municipality which had imposed the tax. Such a supplemental schedule, if it falls within the legislative authorization cannot be suspended by the Illinois Commerce Commission.[3] Section 36(a) also provides that the additional charge:

[3] When Illinois municipalities have imposed or increased the local messages tax, IBT has almost invariably filed supplemental schedules to recoup the amount of the tax from its customers. On at least one occasion, however, an inadvertent delay in the preparation of a supplemental schedule resulted in IBT's bearing an increased rate of municipal tax for two and one-half months without recouping the amount of the tax from its subscribers.

shall be made by the addition of a uniform percentage to the amounts payable for intrastate utility service in such municipality and shall be shown separately on the utility bill to each customer.

In 1965, when Illinois increased the rate of the state messages tax, the legislature again amended section 36 by adding subsection (b). This addition performed essentially the same function as subsection (a); it authorized tax rate above the prior rate of three percent and provided that IBT could file immediately effective supplemental schedules to recoup any such tax increase.[4]

IBT has computed the federal excise tax which it collects for the government from its customers on a base which includes the separately stated state and local taxes imposed on it. According to Agron this procedure resulted in an overstatement of his federal tax. His efforts to recover the alleged overpayment began in 1967 when he filed a class action against IBT. The suit was eventually dismissed for lack of jurisdiction apparently on the ground that it was essentially a tax refund suit and the jurisdictional requirement of section 7422(a) of the Internal Revenue Code that the taxpayer file a refund claim before bringing such a suit was not complied with. Agron then filed two refund claims, one on behalf of himself individually and another on behalf of himself and all similarly situated subscribers to IBT's services and also on behalf of IBT, and brought the instant suit for refund.

Agron initially named IBT and the United States as defendants in all three counts of his complaint. Count I sought recovery of the amount of Agron's individual tax

[4] Although the additional charge authorized by section 36(b) apparently is not required to be separately stated on the subscriber's telephone bill, IBT has added the amount of the increased state taxes in excess of three percent to the amount of local taxes and has stated the two in one separate category designated as attributable to state and city taxes. Agron seeks recovery only of the amount of federal tax attributable to the inclusion of the separately stated state and local taxes in his federal tax base; he does not contend that the federal tax base should not include the three percent state messages tax which has for many years been imposed on IBT and which although not separately stated, is recouped from IBT's subscribers through rates established after the formal procedure of notice and hearing provided by Ill. Rev. Stat. ch. 111 ⅔, § 36 (1969).

refund claim; Count II asserted a claim for refund of taxes on behalf of a class consisting of all of IBT's subscribers; and Count III sought a refund not only on behalf of all IBT subscribers, but also on behalf of IBT. The Government moved that all three counts be dismissed, but suggested that Count I would state a jurisdictionally sound cause of action if IBT were not joined as a defendant.[5] Agron then voluntarily dismissed IBT from Count I and moved for summary judgment on all three counts. The Government answered Count I and filed a cross-motion for summary judgment on that count while persisting in its claim that the court lacked jurisdiction over Counts II and III. IBT moved for summary judgment on Counts II and III on the ground that it was not a necessary or a proper party.

The district court granted Agron's motion for summary judgment against the United States on Count I[6] and subsequently denied Agron's motion for summary judgment on Counts II and III, ruling in effect that the refund claims filed by the plaintiff on behalf of IBT and the members of the class he purports to represent were not sufficient to satisfy the jurisdictional requirement for maintaining a statutory refund suit. Int. Rev. Code of 1954, § 7422(a). The district court granted Agron judgment for $23.98 against the United States on Count I and dismissed Counts II and III for lack of jurisdiction. Agron appeals the dismissal of Counts II and III and the Government appeals the judgment for Agron on Count I.

We hold that IBT properly computed the federal tax which it collects from its customers and that the district court erred in entering judgment for Agron on Count I. That holding disposes of these appeals and we need not consider the correctness of the district court's order dismissing Counts II and III.

Agron first contends that as a matter of Illinois law, those state and local taxes which are separately stated

[5] The Government's jurisdictional objection to Count I was based on its contention that under 28 U.S.C. § 1346(a)(1), as interpreted in United States v. Sherwood, 312 U.S. 584 (1941), joinder of any other defendant with the United States is impermissible. Accordingly, the dismissal of IBT from Count I removed the alleged jurisdictional defect.

[6] Agron v. Illinois Bell Tel. Co., 319 F. Supp. 418 (N.D. Ill. 1970).

on his telephone bill, while nominally imposed on IBT, are actually direct taxes on telephone subscribers and that his payment of taxes imposed on him by the State of Illinois and the City of Chicago cannot be included in "amounts paid for . . . communication services" under section 4251(a) of the Internal Revenue Code.[7]

The Illinois statutes authorizing and imposing a tax on the occupation or business of transmitting messages by means of electricity are explicit. Ill. Rev. Stat. ch. 120, § 467.2 and ch. 24, § 8-11-2 (1969). For instance, section 467.1 provides that: " 'Taxpayer' means a person engaged in the business of transmitting messages"; and section 467.2 states that: "A tax is imposed upon persons engaged in the business of transmitting messages in this State." It would be difficult to interpret such specific language as imposing a tax on telephone subscribers. It may be that IBT normally "passes on" to its subscribers the economic burden of the state and local occupation taxes[8] just as every unsubsidized business must "pass on" and recover from its customers every item of operating expense—including state and federal taxes—if it is to operate profitably.[9] But the fact that the telephone subscriber ultimately bears the financial burden of the tax does not justify our ignoring the clear language of the Illinois statutes and holding that the tax is "imposed" on subscribers.

---

[7] We have assumed, with Agron, that if the state and local taxes in question were actually direct taxes imposed on telephone subscribers, then amounts attributable to those taxes could not be considered "amounts paid for . . . communication services." Because we hold that the State of Illinois does not consider its state and local taxes to be direct taxes on subscribers, we need not reach and do not decide that question.

[8] However, as we pointed out in note 6, supra, on at least one occasion IBT was forced to bear an increased rate of municipal tax for two and one-half months. Agron does not suggest that IBT's failure to "pass the tax on" to its subscribers in any way affected its liability to pay the tax.

[9] Cf. FPC v. United Gas Pipe Line Co., 386 U.S. 237, 243 (1967); and Galveston Elec. Co. v. Galveston, 258 U.S. 388, 399 (1922). In those cases the Supreme Court stated that an allowance for taxes should be included in determining regulated utilities' expenses for purposes of fixing rates which will provide a fair return. Thus the economic burden of the federal taxes is "passed on" to consumers but that does not result in the taxes' being "imposed" on consumers.

The decisions of the Illinois Supreme Court make clear that it is the privilege of carrying on certain businesses within the state that the legislature intended to tax in enacting the occupation taxes. *See, e.g., People's Drug Shop, Inc.* v. *Moysey,* 384 Ill. 283, 285-87, 51 N.E. 2d 144, 146 (1943). In *Reif* v. *Barrett,* 355 Ill. 104, 109, 188 N.E. 889, 892 (1933),[10] the court stated that the purpose of an occupation tax is:

> [E]ither to regulate and control a given business or occupation, or to impose a tax for the privilege of exercising, undertaking or operating a given occupation, trade or profession. Its effect is to license a person engaged in a given calling or occupation. A license in form may not be issued to a taxpayer but the payment of the tax is the license under the authority of the State to engage in such occupation.

Thus it is apparent that Illinois has not considered its occupation taxes to be direct taxes on consumers.

Even though the economic burden of the occupation taxes is "passed on," the Illinois courts have consistently ruled that such taxes are not imposed on consumers. In *Winter* v. *Barrett,* 352 Ill. 441, 455-56, 186 N.E. 113, 120-21 (1933), the court rejected the argument that the state tax on those engaged in the business of selling personal property at retail was imposed on consumers. The court pointed out that retailers could take the tax into consideration in fixing the selling price of their goods, "the same as they do their property taxes, rent and other expenses of doing business"; but the court held that the tax remained on the seller and that the seller must report and pay tax on the full amount he receives for his property, including any amount added to the price to compensate for the tax. *See also Vause & Striegel, Inc.* v. *McKibbin,* 379 Ill. 169, 173, 39 N.E.2d 1006, 1008 (1942). The Illinois Supreme Court used the same reasoning to reject an analogous argument by a liquor retailer who contended that federal and state taxes nominally imposed on distillers were actually "passed on" to retailers and ultimately to consumers and that amounts attributable to those taxes could not be included in gross

[10] Reif v. Barrett, insofar as it held that the Illinois Constitution limited the legislature to property taxes, occupation taxes and franchise or privilege taxes, was overruled by Thorpe v. Mahin, 43 Ill. 2d 36, 45, 250 N.E. 2d 633, 637 (1969). See n. 11, supra.

receipts subject to the occupation tax on retailers. *Fischman & Sons, Inc.* v. *Department of Revenue*, 12 Ill. 2d 253, 146 N.E.2d 54 (1957). *See also People* v. *Werner*, 364 Ill. 594, 5 N.E.2d 238 (1936). A three-judge federal district court has followed the Illinois courts in ruling that the Illinois Retailers' Occupation Tax—even if passed on—is not imposed on consumers. *United States* v. *Department of Revenue*, 202 F. Supp. 757 (N.D. Ill.), *aff'd per curiam*, 371 U.S. 21 (1962).

Even if the language of the Illinois statutes and court decisions were less clear, a further bar exists to our accepting Agron's argument that the state and local occupation taxes are imposed on consumers. For many years the Illinois Supreme Court consistently ruled that the state constitution, art. IX, § 1, limited the legislature to three forms of taxation: (1) property taxes on a valuation basis, (2) occupation taxes, and (3) franchise or privilege taxes.[11] This restrictive interpretation of the state constitution was recently disavowed by *Thorpe* v. *Mahin*, 43 Ill. 2d 36, 42-45, 250 N.E.2d 633, 636-37 (1969); but the tax on IBT was obviously intended, when enacted, to fall within the constitutional authorization of taxes on occupations. We may not ignore the obvious intention of the Illinois legislature and rule that this occupation tax is a direct tax on consumers. Further, the title of the state taxing statute applicable to IBT is, "An Act in relation to a tax upon persons engaged in the business of transmitting messages"; and under art. IV, § 13 of the state constitution, no tax may be imposed upon persons not described in the title of the taxing statute. *See, e.g., International Business Machines Corp.* v. *Department of Revenue*, 25 Ill.2d 503, 185 N.E.2d 257 (1962). *Cf. Central*

[11] See, e.g., Reif v. Barrett, 355 Ill. 104, 110, 188 N.E. 889, 893 (1933); Bachrach v. Nelson, 349 Ill. 579, 589, 182 N.E. 909, 913 (1932). Only recently has the Illinois Supreme Court, in upholding the state income tax, Ill. Rev. Stat. ch. 120, § 1-101 (1969), overruled Reif and Bachrash and held that Ill. Const. art. IX, § 2, broadened the forms of taxation beyond those stated in art. IX, § 1. Thorpe v. Mahin, 43 Ill. 2d 36, 42-45, 250 N.E. 2d 633, 636-637 (1969). Even then, the court referred to the tax as one on the privilege of receiving income, 43 Ill. 2d at 45, 250 N.E. 2d at 638.

We note that Illinois recently adopted a new constitution generally effective July 1, 1971. However, the new constitution is not relevant to our interpretation of statutes passed many years ago under the old constitution.

Television Serv. Inc. v. *Isaacs*, 27 Ill.2d 420, 189 N.E.2d 333 (1963).[12]

Agron's argument that the occupation tax on IBT is imposed on him and other telephone subscribers rests entirely on certain language in a recent case, *East St. Louis* v. *Union Elec. Co.*, 37 Ill.2d 537, 542-43, 229 N.E.2d 522, 525 (1967), *cert. denied*, 390 U.S. 948 (1968), to the effect that the burden of a certain municipal occupation tax fell directly on consumers:

> On a literal and superficial view it might appear as if the utility tax ordinance imposed a tax burden upon the Company, but on examination it is evident that the burden was placed on the consumers. The Company as authorized simply passed on the new charges to its consumers and the consumers not only paid such charges to the City but also paid the Company the expenses it incurred while serving as a collector or conduit of taxes from the consumers to the City.

The district court accepted Agron's argument and, relying on *East St. Louis*, ruled that "Illinois does not consider these amounts on the telephone bill due to state and local taxes to be levies on the company, but, rather, charges on the telephone subscriber." 319 F. Supp. at 421. We disagree. *East St. Louis* involved the construction of a 1948 municipal ordinance which granted the Union Electric Company the right to operate its distribution system within the City of East St. Louis. In return, the company agreed to pay annually the amount by which certain percentages of its gross receipts exceeded all other payments to the city for "fees, licenses, charges, taxes or other exactions . . . imposed by any valid ordinance of the City of East St. Louis." In 1960 when the city imposed a municipal occupation tax on the company, a controversy developed over whether the occupation tax was a "tax" within the 1948 franchise ordinance. If it were, the electric company would have had no further liability for franchise payments. The company, although it passed on the occu-

[12] A municipal tax upon persons not described in the authorizing statute is also void. Cf. Wabash R.R. v. Department of Revenue, 28 Ill. 2d 128, 191 N.E. 2d 244 (1963).

pation tax to its customers, refused to make further franchise payments and asserted that to require it to do so would unconstitutionally impair its franchise contract with the city.

The question before the Illinois Supreme Court was whether an occupation tax which imposed no additional economic burden on the electric company fell within the intendment of "taxes" as expressed in the city's 1948 ordinance. Relying on the rule that, "A state or ordinance must receive a sensible construction, even though such construction qualifies the universality of its language," *Elmhurst* v. *Buettgen*, 394 Ill. 248, 253, 68 N.E.2d 278, 282 (1946), the court held that the company's liability for the occupation tax did not discharge its obligation to make franchise payments.

East St. Louis does not support the district court's ruling since it merely recognized the economic reality that the ultimate consumer bears the burden of all prior taxes imposed on those from whom he receives goods or services. That case held only that the parties did not intend in 1948 that the imposition in the future of a tax which imposed no burden on the electric company would discharge its obligations under the franchise ordinance. We agree with the Government that the Illinois Supreme Court could hardly have intended by its decision to rewrite whole sections of the statutes and ordinances imposing occupation taxes on utilities.

From the foregoing, we conclude that the statement of the Illinois Supreme Court in *People's Drug Shop, Inc.* v. *Moysey*, 384 Ill. 283, 287, 51 N.E.2d 144, 146 (1943), concerning the Retailers' Occupation Tax is applicable to the state and local occupation taxes presently imposed on IBT: "Unambiguous provisions of the . . . Act proclaim, and the decisions of this court uniformly hold, that the tax imposed is upon retailers and not upon consumers, and that the sole duty of paying the tax rests upon the former."

Agron next contends that even if separately stated state and local messages taxes are not directly "imposed" on telephone subscribers, they are, nevertheless, identified as taxes and ought not be considered a charge for tele-

phone service within the meaning of section 4251(a) of the Internal Revenue Code. The Government counters that the additional charge is merely part of the compensation demanded by IBT for furnishing the service of transmitting messages; thus, amounts paid to reimburse IBT for its payment of the state and local messages taxes—just as amounts paid to reimburse IBT for all other taxes and for labor costs and equipment repairs—are paid for telephone service within the meaning of the statute. We agree with the Government. All costs incurred in making a product or service available—including the cost of federal, state and local taxes—are ultimately borne by consumers. That the cost of taxes imposed on manufacturers and retailers is added into the price at which goods are sold, even if such taxes are itemized and specifically identified, simply increases the price the consumer must pay to receive the goods or services.

Additional charges contained in supplemental schedules filed by IBT under Ill. Rev. Stat. ch. 111 ⅔, §§ 36(a) and 36(b) (1969), even though in economic terms they result in the passing on of the burden of state and local messages taxes to subscribers, are simply a part of the price such subscribers must pay to IBT to receive telephone service.[13] Agron argues that the additional charges are not a part of IBT's price for its services because these charges are not authorized by rate schedules arrived at independently by the Illinois Commerce Commission after notice and hearing. We deem this fact to be without significance. The additional charges were authorized by the Illinois legislature which, in enacting sections 36(a) and (b) of Ill. Rev. Stat. ch. 111 ⅔ (1969); was not imposing a tax on consumers or creating a new type of charge for utility service but was simply providing a convenient, efficient procedure by which IBT could bypass the costly administrative rate-making procedure and obtain minor increases in the authorized rate for its services.

[13] Perhaps it might also be argued that even direct federal, state and local taxes of subscribers are a part of the "price" those subscribers must pay to receive telephone service. But that simply illustrates the extent to which the problem presented by this case is one of semantics; it does not change our view that amounts IBT demands, under schedules authorized by Illinois law, as reimbursement for taxes it pays are as much a part of its price for its services as amounts reimbursing it for labor or equipment costs.

In his attempt to show that the additional charges collected by IBT are not a part of the price for telephone service, Agron argues that persons living in cities which have not imposed a local tax on IBT receive the same service at a lower price than persons living in cities where a local tax on IBT is in effect. For example, according to Agron, the basic charge for a three minute call between Chicago and Lincoln, Illinois, is $1.00. Using Agron's figures, if the call originates in Lincoln, the total charge is $1.10—$1.00 plus ten cents federal tax; however, if the call originates in Chicago, the total charge is $1.16—$1.00 plus five cents local tax, plus eleven cents federal tax. Agron concludes that the Chicagoan is required to pay ten percent more federal tax for the identical service because of the inclusion of Chicago's separately stated local tax in the determination of the charge for the service. Agron has failed to recognize, however, that Chicago, by imposing a municipal tax on IBT, has increased the cost of IBT's doing business within the city with the consequence that Chicago residents must pay more *for telephone service* to provide IBT a fair return. Since the federal tax is based on "the sum of all charges for . . . [telephone] services included in the [consumer's] bill," it follows that the amount of federal tax which Chicago residents must pay would increase;[14] and neither IBT nor the

[14] The Government places much reliance on the fact that Congress provided that the tax be computed on "the sum of all charges." We agree that that language indicates a general congressional intention that the amount charged by a telephone company should not be broken down into its component parts for purposes of computing the tax. For instance, it is clear that no attempt should be made to separate out the amounts attributable to taxes, of whatever kind, which were considered by the Illinois Commerce Commission in fixing IBT's general rate structure. Agron concedes this by his failure to seek recovery of any taxes attributable to the inclusion in the federal tax base of amounts which IBT receives as reimbursement for its payment of that part of the state messages tax (the initial three percent) which is not separately stated.

However, Agron correctly points out that the "sum of all charges" language does not itself solve the problem presented in these appeals; for it is only the sum of all charges for telephone service which is subject to tax. The Government appears to concede that not every charge which might be contained in a telephone bill should be included in the federal tax base. For instance, amounts paid by telephone subscribers in order to be listed in "yellow page" directories are considered payments for advertising rather than for telephone service and are not subject to the federal tax. See Revenue Ruling 58-299, 1958-1 Cum.

State of Illinois can defeat that result by providing for the itemization, of those amounts passed on to consumers which are attributable to taxes on IBT. *Cf. Vause & Striegel, Inc.* v. *McKibbin*, 379 Ill. 169, 173, 39 N.E.2d 1006, 1008 (1942).

In *Lash's Products Co.* v. *United States*, 278 U.S. 175 (1929), the Supreme Court was faced with an argument essentially identical to that made by Agron. There, a manufacturer, who was subject to a federal tax computed on the price at which he sold certain products and who had notified his customers that the price of his products reflected his tax liability, argued that amounts which he received from his customers to reimburse him for his obligation to pay the federal tax were not a part of the "price" of his products and could therefore not be included in the base on which the federal tax was computed. In effect, the manufacturer argued, as does Agron here, that amounts attributable to his tax liability were not charges for the product but were for taxes. The language of the Supreme Court in rejecting the manufacturer's argument, 278 U.S. at 176, is equally applicable to Agron's claim:

> [T]he tax is laid and remains on the manufacturer and on him alone. . . . The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all.
>
> • • •
>
> The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore it is part of the price. . . ."[15]

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[14] (Continued)
Bull. 436; cf. Revenue Ruling 68-92, 1968-1 Cum. Bull. 488. Thus the crux of the problem before us remains whether the additional charge stated on IBT's bills is an increase in the price for telephone service resulting from IBT's liability for the state and local occuptaion tares.

[15] Cf. James v. Dravo Contracting Co., 302 U.S. 134, 160 (1937); Dow Jones & Co. v. United States, 128 F. Supp. 748 (Ct. Cl. 1955); Sun Oil Co. v. Gross Income Tax Div., 238 Ind. 111, 149 N.E. 2d 115 (1958); Fischman & Sons, Inc. v. Department of Revenue, 12 Ill. 2d 253, 146 N.E. 2d 54 (1957); Hoffman v. City of Syracuse, 2 N.Y. 2d 484, 141 N.E. 2d 605 (1957); People v. Werner, 364 Ill. 594, 5 N.E. 2d 238 (1936). These cases recognize that increases in the amount a purchaser must pay for goods or services in order to compensate the seller for taxes imposed on him or on those from whom he purchased the goods are a part of the "price" of the foods themselves. The prior taxes merely increase the cost of the goods.

Applying the Court's reasoning to Agron's argument, we conclude that even though the additional charges imposed on Agron and other telephone subscribers may be directly attributable to state and local taxes paid by IBT, those additional charges are nonetheless a part of the price IBT demands for its services. Accordingly, they are properly includable in the base on which the federal tax on "amounts paid for . . . communication services" is computed.

In sum, we conclude that the procedure by which IBT computes and collects the tax imposed by section 4251 of the Internal Revenue Code does not result in any over-assessment of the federal tax and that the district court erred in granting a tax refund to Agron. This holding renders moot the issues presented by Agron's appeal. Since we hold that there was no underlying cause of action on which a class suit could be based, we need not reach the procedural problems raised by Agron's attempting to bring a class or derivative action for tax refund, and we intimate no opinion on the correctness of the district court's dismissal of Counts II and III.

Our ruling on the merits of Agron's claim also disposes of the Clevelands' appeal. Their original complaint was filed in the Circuit Court of Cook County on behalf of themselves and all similarly situated IBT subscribers. That suit was against IBT alone and alleged the same improper computation of federal tax as was asserted by Agron. After removal of the federal district court, the plaintiffs filed an amended complaint naming the United States as defendant with IBT. Both defendants sought dismissal of the complaint on the ground, among others, that the plaintiffs had failed to file an administrative refund claim as required by section 7422(a) of the Internal Revenue Code. The district court granted the dismissal.

The Clevelands rely on essentially the same facts as those presented by Agron but urge a different legal theory. They argue that their suit is not for refund of taxes and that their dispute is solely with IBT, whom they contend has overcharged its customers without authority under either federal or state statute. They argue that,

accordingly, the United States need not be a party and that the filing of an administrative tax refund claim is not a prerequisite to their bringing suit.

Because we hold that IBT properly computed the federal tax in accordance with the provisions of the Internal Revenue Code, the underlying basis of the Clevelands' complaint falls and therefore we need not decide whether the Clevelands should have been required to file an administrative tax refund claim or who, as between IBT and the federal government, might be liable for any alleged overcharge.

The order granting Agron's motion for summary judgment and denying the Government's motion for summary judgment as to Count I of Agron's complaint is reversed; the order dismissing the Clevelands' complaint is affirmed; and Agron's appeal from the dismissal of Counts II and III of his complaint is dismissed as moot.

2.

Opinion of United States District Court in case of Agron v. Illinois Bell & United States, No. 69 C 1971 handed down October 16, 1970, and reported in 319 F. Supp. 418:

MAROVITZ, *District Judge*

MEMORANDUM OPINION

Cross-motions for Summary Judgment on Count I

This is an action for the refund of certain federal excise taxes on telephone service alleged to have been overpaid since and including the last quarter of 1965. In addition to the alleged overpayments or overcollections, depending on one's view, plaintiff seeks statutory interest.

The Complaint consists of three counts: Count I, brought by Robert C. Agron, a subscriber to the telephone services of the Illinois Bell Telephone Company

(IBT), against the United States raises the narrow, if perplexing, legal issue of the taxability of certain amounts set forth of plaintiff's telephone bill. Count II is brought as a class action by plaintiff on behalf of all telephone subscribers similarly situated. The Illinois Bell Telephone Company is joined as a defendant in this count. Count III is brought not only on behalf of all IBT subscribers, but also on behalf of IBT. Presently pending before this Court are cross-motions for summary judgment on Count I, IBT's motions for summary judgment on Counts II and III, and the Government's motions to dismiss Counts II and III. While Counts II and III raise jurisdictional and procedural questions, the ultimate substantive issue in all counts, the propriety of the challenged federal tax on telephone service, is the same. We turn now to the cross-motions for summary judgment on Count I. "(S)ummary judgment is appropriate where, as here, there are no material factual issues in dispute and only legal issues need be resolved. *Chicago Joint Board* v. *Chicago Tribune Co.*, 307 F. Supp. 422, 424 (N.D. Ill. 1969).

The Government, under 26 U.S.C. § 4251 (a), imposes a communications excise tax on persons who pay for local toll telephone service. Local and toll telephone service is defined in the following section, 26 U.S.C. § 4252 (a,b). Telephone companies such as IBT, are required to collect the federal communications tax imposed on their subscribers under Section 4251. 26 U.S.C. § 4291.

The State of Illinois also imposes taxes on telephone companies engaged in transmitting messages. Ill. Rev. Stats., Ch. 120, § 467.2 (1969). The companies are au-

thorized to pass a portion of that tax on to their subscribers or customers. Ill. Rev. Stats., Ch. 111⅔, § 36 (b). Similarly, some local municipalities impose a tax on telephone companies. Ill. Rev. Stats., Ch. 24, § 8-11-2 (1969), which charge may also be passed on to customers. Ill. Rev. Stats., Ch. 111⅔, § 36 (b) (1969).

On its bills to its customers, the IBT separately lists the amount due on account of state and local taxes. See Complaint, Ex. 2 to Ex. 1. The Government, through the IBT as its collector or conduit, has been collecting its communications services tax, currently at the rate of 10%, on the total of the charges set forth by both telephone service and state and local taxes. For instance, one IBT bill sent to plaintiff provided in part:

		Due to Taxes*	U. S. Tax	
Telephone service	17 50	59	1 81	19 90

* City and state taxes

The narrow substantive issue before the Court is whether the federal communications tax is properly imposed. Plaintiff claims that the amount on his bill "due to taxes" is not an amount paid "for communication services," pursuant to 26 U.S.C., §4251 (a), that, basically, he is being taxed on a tax, and that, consequently, the amounts attributable to state and local taxes should be excluded from consideration when the federal excise tax is calculated. Essentially, the Government's position is that the various state and municipal taxes are imposed on the telephone companies and not on telephone customers, that these items are just like any other operating expenses, and that they may be passed on to the customers as a charge for communications services.

The federal excise tax is imposed on "amounts paid for the following communications services . . .:

> Local telephone service.
> Toll telephone service.
> . . ."

26 U.S.C. §4251 (a) (1). Both parties agree that the terms local and toll telephone service are to be given "their commonly accepted and understood meaning—the right to use a telephone which is part of a telephone system and to communicate thereby with other persons having telephones which are part of this system." Now 26 U.S.C. § 4254 (a) provides that "(i)f a bill is rendered the taxpayer for local telephone service or toll telephone service—

> (1) the amount on which the tax with respect to such services shall be based shall be the sum of all charges for such services included in the bill . . ."

Again, plaintiff claims that the federal tax is on the cost of telephone services only and not on local or state taxes on those services. The Government suggests that the challenged amounts are another kind of charge for such services which charge may be used as a basis for calculating the federal tax due.

A key to this puzzle can be found in the construction of the Illinois statutes which concern telephone taxes. As noted previously, "persons engaged in the business of transmitting messages in" Illinois, e. g., telephone companies, are assessed a "gross receipts" tax. Ill. Rev. Stats., Ch. 120, § 467.2 (1960), which tax may be passed on to their customers, Ill. Rev. Stats., Ch. 111⅔ § 36 (b) (1969). Confronted with interpreting parallel statutory provisions which ostensibly taxes public utilities such

as electric companies and permitted them to pass the charges on to their customers, the Illinois Supreme Court said in *East St. Louis* v. *Union Electric Co.*, 37 Ill. 2d 537, 542-43 (1967):

> "On a literal and superficial view it might appear as if the utility tax ordinance imposed a tax burden upon the Company, but on examination it is evident that the burden was placed on the consumers. The Company, as authorized, simply passed on the new charges to its customers and the consumers not only paid such charges to the City but also paid the Company the expenses it incurred while serving as a collector or conduit of taxes from the consumers to the City."

Essentially, then, the Illinois Supreme Court found that the statutory assessments were tantamount to or functionally equivalent to direct taxes on the consumers because the consumers were authorized to be charged, were charged, and, in fact, paid the amount due, plus an extra portion to cover the cost of collection. Significantly, the companies absorbed no collection costs. *Id.*

The state and local telephone tax system is indistinguishable from the utilities tax system construed in the *East St. Louis* case. Based on that case, there is no doubt that Illinois does not consider those amounts on the telephone bill due to state and local taxes to be levies on the company, but, rather, charges on the telephone subscriber. Under this construction, the amounts are not charges for local or toll telephone service under federal law. Consequently, they ought not be considered in that basis from which the federal telephone excise tax is figured.

Both sides make numerous references to former and current tax regulations which purport to clarify the lan-

guage of the internal revenue statutes. We are frank to say those regulations basically are wordy exercises in circular reasoning which, in the final analysis, add little or nothing to an understanding of the problem before this Court.

We find, then, that the amount on plaintiff's telephone bill which is separately listed as due to taxes is not a charge for telephone services, but rather, an assessment which is based on the telephone company's charge for service. Moreover, this assessment is, in reality, levied against the telephone subscriber or consumer. Thus, the federal telephone excise tax may not be based, to any extent on this amount. Summary judgment on Count I of the Complaint is granted to plaintiff and denied to the Government.

3.

Copy of Opinion of United States District Court in Agron v. Illinois Bell and United States, No. 69 C 1972 handed down December 11, 1970 and reported in 325 F. Supp. 487:

MARKOVITZ, *District Judge,*

MEMORANDUM OPINION

Cross-Motions for Summary Judgment

This is an action for the refund of certain federal excise taxes on telephone service. The Complaint consists of three counts. Count I was brought by Robert C. Agron, a subscriber to the telephone services of the Illinois Bell Telephone Company (IBT), against the United States, and challenged the legality of the assessment of federal telephone excise taxes on that portion of a subscriber's telephone bill which is attributable to state and local

taxes. On October 16, 1970, this Court granted summary judgment to plaintiff and against the Government, holding that assessments due to state and local taxes could not be considered in that basis from which the federal telephone excise tax was calculated, 319 F. Supp. 418. Count II of the Complaint is brought on behalf of all telephone subscribers similarly situated. IBT is joined as a defendant in this count. Count III is brought not only on behalf of all IBT subscribers, but also on behalf of IBT. Presently before the Court are the Government's motion to dismiss Counts II and III, IBT's motion for summary judgment on Counts II and III, and plaintiff's motion for a class action determination and for summary judgment on Counts II and III.

[1] While extensive and involved briefs have been submitted by all parties, the complete, if short, answer to the basic issue raised in Count II is that plaintiff's class action for tax refunds may not be maintained. An action for the refund of federal taxes may only be commenced after an administrative claim has been filed and disallowed. 26 U.S.C. § 7422(a); *United States* v. *Wells Fargo Bank*, 393 F. 2d 272, 273 (9th Cir. 1968); *Mulcahy* v. *United States*, 388 F. 2d 300, 302 (5th Cir. 1968); *England* v. *United States*, 261 F. 2d 455, 456 (7th Cir. 1958). Plaintiff has not alleged that any, much less all, of the tens of thousands of claimants on whose behalf he allegedly brings this action have exhausted their available administrative remedies. Plaintiff does allege that he filed and administrative tax refund claim on behalf of himself and all telephone subscribers similarly situated and that said claim was rejected. Complaint ¶ 23,

Ex. 4. We find that attempt at satisfying the administrative prerequisites to this kind of civil suit to be unsatisfactory. By failing to name the claimants and the amounts due to each, plaintiff's claim on their behalf falls far short of the detail required by federal regulations. 26 C.F.R. § 301.6402-2. See *Herrington* v. *United States*, 416 F. 2d 1029, 1031-1032 (10th Cir. 1969).

[2] Essentially, an unauthorized agent may not "claim an unspecified refund for unknown principals." *Hankins* v. *United States*, 66-2 U.S.T.C. ¶ 9543, at 86,702 (E.D. Okla. 1966), aff'd. on other grounds, 375 F. 2d 239 (10th Cir. 1967). Consequently, the only party of whom we are aware that has standing to bring this action under 28 U.S.C. § 1346(a) (1), is the named plaintiff, Agron, who, at best, may be said to constitute a class of one. *McConnell* v. *United States*, 295 F. Supp. 605, 606 (E.D. Tenn. 1969); *Lipset* v. *United States*, 37 F.R.D. 549, 551-552 (S.D. N.Y. 1965), appeal dismissed, 359 F. 2d 956 (2d Cir. 1966).

[3] Once the class aspects of Count II are disregarded, the only difference between it and Count I is that IBT is named as a party defendant. IBT was allegedly joined as a party defendant under Rule 19, F.R.Civ.P., because it was needed for a just adjudication. Complaint, ¶ 20. The Government persuasively contends that the attempted joinder of a private litigant in a tax refund action is improper. See 28 U.S.C. § 1346 (a) (1); 26 U.S.C. § 7422(f); *Lazier* v. *United States*, 77 F. Supp. 241, 243 (D. N.D. 1948); *DeVan* v. *United States*, 50 F. Supp. 992, 995 (D. N.J. 1943); see also, *United States* v. *Sherwood*, 312 U.S. 584, 588, 61 S. Ct. 767, 85 L. Ed. 1058 (1941); *Berkeley* v. *United States*, 276 F. 2d 9, 12, 149 Ct. Cl. 549 (1960).

Since the relief to which plaintiff is entitled may occur without the involvement of IBT, the company is obviously not necessary in order to achieve a just adjudication. In view of this fact and the rules dealing with the relevant joinder in question, IBT ought to be and is hereby dismissed as a party defendant in Count II.

Summarizing, this Court finds that the only party entitled to bring this action is the named plaintiff, Agron, and that summary judgment is granted to both defendants and denied to plaintiff as to Count II.

[4] Count III is in the nature of a class derivative action brought on behalf of IBT, plaintiff's theory being that IBT breached its fiduciary duty to the class to prevent its subscribers from being overcharged. Much of what has already been stated with respect to propriety of Count II applies here as well. In addition, since the challenged federal tax, 26 U.S.C. § 4251, is imposed on telephone customers, not companies, IBT had no claim to press against the Government. It was not the person assessed, nor was it the authorized agent of such a person, 26 C.F.R. § 301.6402-2(e). Neither was IBT eligible to pursue a claim under 26 U.S.C. § 6415(a) which permits tax collectors to obtain credits or refunds under certain circumstances not alleged to be present in the instant action. The obligation which IBT was bound to perform was not litigation on behalf of its subscribers, but the collection and holding of certain tax revenues according to federal statutes, 26 U.S.C. §§ 4291, 7501(a), and policy. In short, IBT has no corporate claim to press, so there are no shoes in which plaintiff can stand. See *Agron* v. *Illinois Bell Telephone Co.*, 67 C 2041 (N.D. Ill. Aug. 4, 1969), per Napoli, J. Defendants are entitled to summary judgment on Count III.

4.

Opinion and Order of United States District Court in Cleveland v. Illinois Bell, Case No. 69 C 2171 (not reported) refusing to remand cause to the State Court:

MEMORANDUM OPINION filed by Judge Marovitz Denying Plaintiffs' Motion to Remand, filed December 12, 1969:

MEMORANDUM OPINION

Plaintiffs' Motion to Remand

Originally brought in state court, this is an action which alleges that defendant Illinois Bell Telephone Company has wrongfully overcharged plaintiff telephone subscribers and customers. Plaintiffs, who bring this action on behalf of themselves and all those similarly situated, are seeking declaratory and injunctive relief as well as a refund of the money improperly collected. Following the removal of this action from the state court to the federal court, 28 U.S.C. § 1441(b), the plaintiffs filed a motion to remand, 28 U.S.C. § 1447(c).

The party requesting for removal has the burden of proving entitlement. *Pan American Pharmaceutical, Inc.* v. *Sherman Laboratories, Inc.*, 293 F. Supp. 713, 717 (D. P.R. 1968). Further, we note that removal statutes are to be construed strictly, with doubtful cases resolved against removal. *Barnett* v. *Faber, Coe & Gregg, Inc.*, 291 F. Supp. 178, 180 (S.D. N.Y. 1968); *Couch* v. *White Motor Co.*, 290 F. Supp. 697, 699 (W.D. Co. 1968). Should it appear that any case was removed improvidently, the federal court must remand it. 28 U.S.C. § 1447(c).

Civil actions are removable without regard to diversity of citizenship if the federal court has original federal

question jurisdiction. 28 U.S.C. § 1441(b). That is, for proper removal pursuant to this section, the claim or right asserted must arise under the Constitution, treaties or laws of the United States.

> "The federal nature of the claim must appear from consideration of the complaint alone and the claim must be one that is essentially federal; the presence of federal defenses will not operate to confer federal jurisdiction." *Denver Union Stock Yard Co.* v. *Litvak Meat Co.*, 295 F. Supp. 809, 810 (D. Col. 1968).

The pertinent allegations set forth in the instant complaint are that plaintiffs are customers of the defendant telephone company, that there exists a ten per cent (10%) federal excise tax on communication services pursuant to 26 U.S.C. §§ 4251-54, that Section 4254 establishes as the basis against which the tax is assessed "the sum of all charges for such (telephone) services included in the bill . . .," that the telephone company, in determining the amount of excise tax due to the United States, includes in base figure amounts equivalent to various state and local taxes imposed on telephone service, that state and municipal taxes are not proper charges to be included in determining the federal tax base, and that, consequently, the assessment made by the defendant constitutes an "overcharge" or a "tax upon a tax" which is "contrary to the intent of the United States statute hereinbefore referred to . . ." and is otherwise unfair, arbitrary and unconstitutional, thereby entitling plaintiffs to a refund. Complaint, ¶¶ 1-3, 6, 8.

It does not appear that any factual dispute is present or will develop in this case. There is no doubt that the defendant telephone company assesses a federal excise

tax on an amount which includes, in addition to the monthly service charge and a charge for extra call units, a separate charge for state and city taxes. Complaint ¶ 4, Exhibits A-F.

The legal issue presented is a very narrow one, namely, whether or not certain state and local taxes on telephone service are charges includible in determining the amount upon which the federal communications tax is imposed. If so, plaintiffs' action fails. If not, plaintiffs may prevail.

Thus, the resolution of the instant dispute hinges on not just substantially, but entirely, on a construction of a federal statutory scheme. *Cf. Columbia Pictures Corp.* v. *Towne Theatre Corp.*, 282 F. Supp. 467, 469 (E.D. Wis. 1968). The federal law is cited and quoted in the plaintiffs' complaint. A specific allegation is made to the effect that defendant's assessment is contrary to the intent of the law. Federal law, then, is a real, substantial, and essential element of the plaintiffs' case, sufficiently central to affect the outcome. *Urban Renewal Authority of City of Trinidad, Colo.* v. *Dougherty*, 271 F. Supp. 729, 732-33 (D. Col. 1967); *Sylgab Steel & Wire Corp.* v. *Strickland Transp. Co.*, 270 F. Supp. 264, 267-68 (E.D. N.Y. 1967); *Chambers-Liberty Counties Nav. Dist.* v. *Parker Bros. & Co.*, 263 F. Supp. 602, 606 (S.D. Tex. 1967).

The plaintiffs have suggested that removal was improper because the United States was not a party to the suit and because the action is not one for refund of taxes from the United States, but, rather, for refund of monies wrongfully assessed by the defendant. First, federal question jurisdiction is not dependent upon the parties to

the lawsuit, but only upon the subject matter presented by the complaint. Next, to say that this action is not brought for a refund of taxes or that the United States is not charging the tax is absurd because, as the complaint alleged, the money was assessed pursuant to federal law regarding communication taxes; 28 U.S.C. §§ 4251-54. Moreover, the defendant in so assessing and collecting the tax was acting as the agent for the federal government, 28 U.S.C. § 4291. See also 26 U.S.C. § 7501 (a); Treas. Reg. § 49.6302(c)-1 (1968).

In contrast to two other cases where a removed case was remanded, *New Jersey* v. *Moriarty,* 268 F. Supp. 546 (D. N.J. 1967) and *Meyerhoff* v. *Garten,* 232 F. Supp. 363 (D. Md. 1964), the instant case involves only federal law and the rights asserted and the relief demanded depend solely upon an interpretation of the phrase "sum of all charges" found in 28 U.S.C. § 4254. Consequently, we find that this court does have original jurisdiction over the claims presented in the complaint and that the case was not improvidently removed.

The plaintiffs' motion to remand is denied.

Enter: /s/ Abraham L. Marovitz

5.

Opinion and Order of United States District Court in Cleveland v. Illinois Bell and United States, Case No. 69 C 2171 (not reported):

ORDER DISMISSING SUIT

This cause coming on to be heard upon the Amended and Supplemental Complaint filed by the Plaintiffs on behalf of themselves and all telephone subscribers and

customers of Illinois Bell Telephone Company similarly situated, and upon the motion to dismiss filed by the United States of America, Defendant, and upon the answer filed by the Defendant, Illinois Bell Telephone Company, an Illinois corporation, and upon the petition of the Plaintiffs for an order to consolidate the above entitled with the cause entitled "Robert C. Agron, etc. vs. Illinois Bell Telephone Company, an Illinois corporation and United States of America, No. 69 C 1972" pending in the United States District Court, and the Court having heard the arguments of respective counsel and having read the briefs filed by the various parties hereto, and the Court being fully advised in the premises;

It Is Ordered that the motion to dismiss filed by the United States of America be and the same is hereby allowed, and the above cause is hereby dismissed against the United States of America at Plaintiffs' cost.

It Is Further Ordered that the Court having read the answer filed by the Defendant, Illinois Bell Telephone Company, an Illinois corporation, that the above cause be and is dismissed as to the Defendant, Illinois Bell Telephone Company, an Illinois corporation, at Plaintiffs' cost.

It Is Further Ordered that the amended and supplemental complaint heretofore filed by the Plaintiffs in the above entitled cause be and is dismissed in its entirety at Plaintiffs' cost.

It Is Further Ordered that the petition of the Plaintiff to consolidate the above entitled cause with the case entitled "Robert C. Agron, etc. vs. Illinois Bell Telephone Company, an Illinois Corporation and United States of

America, No. 69 C 1972, be and the same is hereby denied, the matter having become moot as a result of the order entered by this Court this day in the cause entitled Robert C. Agron, etc. vs. Illinois Bell Telephone Company, et al, referred to herein.

Enter:

/s/ Judge Abraham L. Marovitz